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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 530

MARY H. SHELP and GENEVIEVE M. McKINNEY,
Petitioners,

versus

NATIONAL SURETY CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR NATIONAL SURETY CORPORATION IN OPPOSITION.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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STATEMENT

In this diversity tort action plaintiffs demand damages for personal injuries sustained when one of them was raped and both were assaulted by an intruder who gained entrance to an apartment that they were then occupying. The demands are directed against the insurer of the landlord of the premises, who was charged with negligence "in failing to furnish a safe entrance door, in failing to remedy known defects, and in other particulars".

Plaintiff Shelp commenced her residence in the apartment in August of 1960 (R. 21). The front door of the

apartment was just off the sidewalk, adjacent to the street (R. 14). More than two years later the door swelled, apparently due to rain, and became hard to close (R. 21 and 11). However, both plaintiffs were aware of this prior to their unfortunate experiences (R. 11 and 21).

On the afternoon of February 23, 1962, plaintiff McKinney went to a grocery store. Upon her return, she unlocked the door and had to push it with her shoulder to open it (R. 12). As she entered the apartment, she pushed the door with her arm as hard as she could, and thought it had closed (R. 13). Plaintiff McKinney then went into the kitchen to deposit her bag of groceries (R. 13). Thereafter, she returned to the front of the apartment to assure herself that the door was completely closed (R. 13). When she reached a point about eight to ten feet from the door, the culprit came through the doorway into the apartment (R. 13 and 14).

Both plaintiffs conceded that the door could be closed by them, provided they exercised sufficient exertion to accomplish it (R. 15, 22 and 23).

In the District Court, defendant moved for summary judgment, basing its motion upon the depositions of plaintiffs, which were taken upon oral examination. The District Court granted the motion and the action was dismissed. *Schelp et al v. National Surety Corporation*, D.C. La., 218 F. Supp. 615. The judgment of the District Court was affirmed by the Court of Appeals. *Shelp et al v. National Surety Corporation*, 5 Cir., 33 F. 2d 431.

THE ISSUES

The issues raised by petitioners in their petition to this Court for a writ of certiorari are that the Court of Appeals, in construing Article 2716 of the Louisiana Civil

Code of 1870, (1) violated the express provisions of said article, (2) ignored a Louisiana intermediate appellate court's decision interpreting said article, and (3) overruled a decision of this Court. They also question the constitutionality of the jurisprudential rule of codal construction, applied by Louisiana courts in interpreting the civil code of that State, whereby the original French version of an article of that code is made to prevail over the subsequent English translation thereof.

ARTICLE 2716 OF THE LOUISIANA CIVIL CODE WAS CORRECTLY CONSTRUED

The long settled jurisprudence of Louisiana is that in interpreting an article of the Louisiana Civil Code of 1870, which has been taken verbatim from the Louisiana Civil Code of 1825, the French version of the article of the Code of 1825 prevails if there is a discrepancy between the French and English texts. *Phelps v. Reinach*, 38 La. Ann. 547; *Strauss v. City of New Orleans*, 166 La. 1035, 118 So. 125; *Sample v. Whitaker*, 172 La. 722, 135 So. 28; *Comment*, 15 Tul. L.R. 272, 274; *Note*, 15 Tul. L.R. 141; *Note*, 3 La. L.R. 452. Under the Erie doctrine (*Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188), this principle of codal construction has been consistently applied by the United States Court of Appeals for the Fifth Circuit. *Commissioner of Internal Revenue v. Gray*, 5 Cir., 159 F. 2d 834, 838; *United States v. Harang*, 5 Cir., 165 F. 2d 106, 110. Sitting, in effect, as Louisiana courts and being guided by this Louisiana jurisprudential rule, both the District Court and the Court of Appeals correctly concluded that since the word "portes" was contained in the French version of Article 2686 of the Louisiana Civil Code of 1825, whence Article 2716 of the Louisiana Civil Code of 1870 was derived, the

word "doors" must be read into Article 2716 of the later revision of 1870 and be included among the repairs to leased premises which the tenant is bound to make.

THE ERIE DOCTRINE WAS PROPERLY APPLIED

Grasping the singular deviation by a Louisiana court from this established Louisiana legal principle of codal construction, *Bradley v. Yancy*, La. App., 195 So. 110, plaintiffs contend that it represents the State's appellate jurisprudence, which was ignored by the Court of Appeals. *Bradley* is a decision of an intermediate appellate court, wherein, after referring to the decisions of the Louisiana Supreme Court in *Phelps*, *Strauss* and *Sample*, *supra*, the court frankly conceded.

> **"It is clear, therefore, if we should follow the above cited decisions, and there are others, we would be compelled to insert and add the word 'doors' to the last paragraph of article 2716 of the Revised Civil Code of 1870;** when the article as written in that code does not include 'doors' in defining the repairs which the tenant is under obligation to make to the leased premises he occupies."

The Louisiana Court of Appeal then presumptuously undertook to ignore the decisions of the Louisiana Supreme Court and to decide the case contrary to the mandate thereof. Quite obviously, since the decision of the question of law involved in *Bradley* was "in conflict with the jurisprudence of the Supreme Court", the defendant's application therein for a writ of review was "granted as a matter of right." *La. Const., Art. 7, Sec. 11.* Furthermore, upon the granting of the writ, the judgment of the Court of Appeals was suspended, pending a decision of the case by the Louisiana Supreme Court, in the

absence of which, due to a subsequent voluntary dismissal of the case by the litigants (15 Tul. L.R. 274), it has never become final. *La. Const., Art. 7, Section 11.*

In *West v. American Telephone & Telegraph Company*, 311 U.S. 223, 237, 85 L. Ed. 139, 144, 61 S. Ct. 179, the weight to be attributed by Federal courts to decisions of intermediate appellate State courts in determining State law under the Erie doctrine was expressed thusly:

> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court **unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.**"

There is considerable "persuasive data", both prior to and after the *Bradley* case, which clearly demonstrates that the Louisiana Supreme Court "would decide otherwise". *Phelps v. Reinach, supra; Strauss v. City of New Orleans, supra; Sample v. Whitaker, supra; Commissioner of Internal Revenue v. Gray, supra; United States v. Harang, supra; Crawford v. Alatex Construction Service, Ins.*, La. App., 120 So. 2d 845, 848.

Petitioners, in contending that a decision of this Court has been expressly overruled, have reference to *Viterbo v. Friedlander*, 120 U.S. 707, 7 S. Ct. 962, 30 L. Ed. 776. This pre-Erie case does not correctly relate the law of Louisiana presently prevailing. As stated by the Court of Appeals in its opinion in the instant case:

> "*Viterbo v. Friedlander*, 1887, 120 U.S. 707, 7 S. Ct. 962, 30 L. Ed. 776, on which the plaintiffs

rely, is simply wrong. Failure of counsel to present the historical background led the United States Supreme Court into mistakenly applying a rule of statutory construction that was inapplicable to the Civil Code."

Viterbo, in the light of the Erie doctrine, must yield to the decisions of the Louisiana Supreme Court, holding otherwise. *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 108, 65 S. Ct. 1464, 1469, 89 L. Ed. 2079, 2086.

THE LOUISIANA RULE OF CODAL CONSTRUCTION IS NOT CONSTITUTIONALLY OBJECTIONABLE

Although petitioners question the constitutionality of the jurisprudential rule of codal construction, applied by Louisiana courts in interpreting the civil code of that State, whereby the original French version of an article of that code is made to prevail over the subsequent English translation thereof, they cite no authorities and submit no argument in support of their contention in this respect. The reason for the rule was to inject certainty into the codal law of Louisiana by making its interpretation dependent upon the French version of the Louisiana Civil Code of 1825, the language wherein it was originally written, rather than upon subsequent erroneous English translations thereof. Surely, neither this motive for the rule, nor the result obtained thereby, can be deemed constitutionally objectionable.

CONCLUSION

For the foregoing reasons, respondents submit that petitioners application for a writ of certiorari is not well

grounded either in law or in reason and that it should be denied.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing opposition brief has this day been served upon the attorney of record for Mary H. Shelp and Genevieve M. McKinney, by depositing the same in a United States Mail box, with postage prepaid, addressed to him at his post office address, all in accordance with Rule 33 of this Court, this _____ day of October, 1964.

HENRY B. CURTIS